Southern California Gas Co. *and* Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL–CIO *and* American Building Maintenance Co., Southern Counties Building Maintenance Co., United Temporary Services, Parties in Interest. Cases 21–CA–25785, 21–CA–25825–1, and 21–CA–25825–3

April 5, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

On June 13, 1990, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Margaret D. Hume, Esq. and *Frank M. Wagner, Esq.*, for the General Counsel.

David P. Reeves, Esq., of Los Angeles, California, for the Respondent.

Reuben A. Guttman, Esq., of Washington, D.C., for the Union.

Mark W. Robbins, Esq. and *Anne M. Geise, Esq. (Littler, Mendelson, Fastiff & Tichy)*, of Los Angeles, California, for American Building Maintenance.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Los Angeles, California, on November 14–17, 1989, and January 9–10, 1990. On October 19, 1987, Hospital and Service Employees Union, Local 399, Service Employees International Union, AFL–CIO (the Union) filed the original charge in Case 21–CA–25785 alleging that Southern California Gas Co. (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On November 6, the Union filed the charges in Cases 21–CA–25825–1, 21–CA–25825–2, and 21–CA–25825–3 alleging that Respondent had violated Section 8(a)(1), (2), (3), and (5) of the Act. Thereafter on November 19, 1987, the Union filed amended charges in all three cases. The Regional Director for Region 21 of the National Labor Relations Board issued a consolidated complaint and notice of hearing against Respondent on December 30, 1988. The complaint was amended on March 17, May 10, and October 30, 1989, and again at the hearing.[1] As amended the complaint alleges that Respondent was a joint employer of janitorial employees represented by the Union and employed under a collective-bargaining agreement between the Union and American Building Maintenance Co. (ABM). The complaint further alleges that Respondent violated Section 8(a)(5) and (1) by unilaterally terminating its contract with ABM and discharging the employees of ABM during the term of the ABM-Union contract. The complaint also alleges that Respondent violated Section 8(a)(3) of the Act by discharging the employees of Advanced Building Maintenance (Advanced) by acting as a joint employer or by directing Advanced to discharge certain employees because of the employees' union activities.[2] Respondent filed a timely answer to the complaint, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs.[3] On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a public utility with an office and principal place of business located in Los Angeles, California. Respondent, in the course and conduct of its business operations, annually purchases and receives goods and products valued in excess of $50,000 from sellers or suppliers located within the State of California, which sellers or suppliers receive such goods in substantially the same form directly from outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulate and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

1. Whether Respondent was a joint employer with its janitorial service contractors with respect to both day- and night-shift and service employees working at Respondent's headquarters facility.

[1] At the hearing the 8(a)(2) allegations of the complaint were withdrawn pursuant to a non-Board settlement of Case 21–CA–25825–2.

[2] At the opening of the hearing, a settlement agreement was reached between Advanced, the General Counsel, and the Union disposing of the 8(a)(3) allegations against Advanced. That portion of the case was remanded to the Regional Director. However, the allegations that Respondent acted jointly with Advanced or directed Advanced to violate Sec. 8(a)(3) were expressly reserved for trial in this case.

[3] Posttrial briefs were filed by the Union, the General Counsel, and Respondent on March 9, 1990.

2. Whether, as joint employer with ABM, Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally terminating the service contract with ABM resulting in a change in terms and conditions of employment of the employees in the ABM-Union bargaining unit.

3. Whether Respondent was obligated to bargain with the Union over its decision to terminate the janitorial service contract with ABM.

4. Whether Respondent violated Section 8(a)(1) and (3) when Advanced terminated five employees in October 1987 because of their union activities.

B. *Bargaining History*

Prior to 1970, Respondent directly employed janitorial employees to perform janitorial and service work at its headquarters facility in Los Angeles, California. Thereafter, from 1970 until early 1988, Respondent contracted with various companies to perform janitorial and service work. In 1977 and again in 1982, ABM was awarded the janitorial and service contract on the basis of competitive bidding. ABM performed the work pursuant to contract until May 1987 when the contract was let to Southern Counties Building Maintenance Co. Thereafter, the contract was let to United Temporary Services and Advanced before the janitorial employees again became employed directly by Respondent in February 1988.

The Union began representing the janitorial employees at Respondent's facility in 1972 pursuant to collective-bargaining agreements with the various janitorial companies. With each change in contractor, the existing unit of employees performing day and night shift janitorial work was retained. When ABM was awarded the contract in 1977, the bargaining unit employees became employees of ABM. From 1978 until 1982 when ABM reacquired the contract, National Cleaning, a company not affiliated with either Respondent or ABM, held the janitorial contract. When ABM obtained the contract anew in 1982, the employees again became employed by ABM. ABM was party to a series of collective-bargaining agreements which covered ABM employees at numerous locations in the Los Angeles area including Respondent's facility. At the times material here, the Union and ABM were party to a collective-bargaining agreement effective from July 1, 1986, to August 31, 1988. Presently, ABM and the Union are party to a collective-bargaining agreement covering ABM's janitorial employees in the Los Angeles area.

C. *Contentions of the Parties*

The General Counsel and the Union contend that Respondent was a joint employer with ABM, and the other janitorial contractors, with respect to the employees performing janitorial work at Respondent's facility. They contend that Respondent violated Section 8(a)(5) and (1) of the Act by terminating its service contract with ABM during the term of the ABM-Union contract. The General Counsel and the Union further argue that even if Respondent was not bound by the ABM-Union contract, as a joint employer, it was obligated to bargain with the Union prior to changing subcontractors. With respect to the 8(a)(3) allegations of the complaint, the General Counsel and the Union argue that Advanced discharged five employees because of their union activities.[4] They contend that Respondent is jointly liable for that conduct on the theory that Respondent was a joint employer with Advanced or on the theory that Advanced was acting at the direction of Respondent.

Respondent argues that it was not the joint employer of the janitorial employees employed by ABM. Rather Respondent contends that ABM was an independent contractor employing its own staff to service the janitorial contract. Respondent further argues that at most it was a joint employer with regard to the day shift but not the night shift. Respondent then argues that even if found to be a joint employer of the day-shift janitors, it can only be held liable for that part of the bargaining unit for which it occupies joint employer status. Respondent contends that since the complaint alleges the appropriate unit was both the day and night shifts no violation can be found if it was only a joint employer of the day shift. Respondent further argues even if it was a joint employer of the bargaining unit employees, it had no obligation to bargain over the decision to terminate ABM's contract and that the Union waived any bargaining obligation by failing to request bargaining over that decision. Respondent argues a joint employer is not bound by another's collective-bargaining agreement. Next, Respondent argues that the Union cannot claim joint employer under the contract 3 months after the joint employer relationship ended. Respondent contends the Union had no majority status after June 1, 1987, when Southern Counties took over. It also contends it was not a joint employer with Advanced. Further, Respondent contends that even if it was a joint employer it should not be held liable for these unfair labor practices. Finally, Respondent argues that there is no competent evidence that Respondent directed Advanced to discharge the five employees.

D. *The Joint Employer Issues*

As mentioned earlier, ABM was awarded the janitorial services contract by Respondent in 1982 on the basis of a successful competitive bid. The contract required ABM to perform certain delineated tasks such as sweeping, mopping, washing windows, and emptying trash. For each such task the contract included a chart showing how often the assignment was to be performed at each of the five buildings comprising Respondent's headquarters. The contract provided that ABM employ an adequate number of trained personnel, maintain an adequate employee reporting system, and provide supervision as is necessary to ensure proper performance of the work. The contract provided the specific number of employees to be provided on the day shift. These day-shift employees provided furniture moving and coffee services in addition to janitorial services. The number of night-shift employees was not specified in the contract but the cleaning services to be provided were clearly specified. The contract provided that ABM ''is an independent contractor and any provisions in the contract which may appear to give [Respondent] the right to direct [ABM] as to the details of the doing of any work to be performed by [ABM] shall be deemed to mean, and shall mean that [ABM] shall follow the

[4] As will be seen infra, the evidence establishes that Advanced discharged the five employees because of their activities in support of a union demonstration. The question presented here is whether Respondent can be held accountable for such unfair labor practices under either of the theories proposed by the General Counsel and the Union.

desires of [Respondent] in the results of the work only and not in the means whereby said work is to be accomplished.''

The contract further provided: (1) that ABM pay ''prevailing wages'' as established by the Public Utilities Commission (PUC), which included an hourly rate plus specified amounts for health insurance and pension contributions as well as specified holidays, vacation, and sick leave;[5] (2) that the contractor cover its employees with worker's compensation insurance and obtain liability insurance in specified amounts; (3) that the classifications of all employees to be employed include foremen and leadmen; (4) that all materials and methods were subject to Respondent's approval; (5) that uniforms provided by ABM were required of all employees; (6) for a prohibition of Sunday work; (7) for a ''format'' for passing on to Respondent increases in union negotiated terms of employment; and (8) for termination on 60 days' notice by either party.

The ABM employees on the day shift worked under the direction of Walter Brooks, leadman. Brooks has worked at Respondent's headquarters facility since 1968 and has been the leadman on the day shift since the early 1980's.[6] Brooks testified that his job duties and responsibilities have remained the same through the various changes in subcontractors. As leadman, Brooks provided work direction and training to janitors, monitored the work of the day crew, distributed work assignments, prepared timecards, and performed janitorial work, when necessary. The General Counsel and the Union argue that Brooks' direction and assignment of work was merely routine in nature, and that Brooks was not a supervisor within the meaning of the Act. Thus, they argue that ABM had no supervisors present during the day shift and that supervision was provided by Respondent. This argument is made to bolster the contention that Respondent was a joint employer of the janitorial employees. Respondent, on the other hand, argues that Brooks was ABM's supervisor who received Respondent's service requests, assigned, and directed the crew in fulfilling ABM's customer's requirements. The evidence supports Respondent's argument.

As indicated earlier, ABM's day crew performed services for Respondent in addition to what would be considered traditional janitorial or custodial work. Brooks received orders for moving furniture, moving boxes, delivering coffee service, engraving, and movie projection from Respondent's supervisor of building services, Don Burrus. He also received orders from a teletype machine and from Vern Vette, Burrus' superior. Brooks assigned employees to perform the work and would oversee the work. If Brooks could not be present, he would later inspect to make sure the work was properly done. Brooks prepared timecards for employees, submitted them to Burrus for review,[7] and then forwarded the timecards to ABM's payroll office. Payment and deductions were made by ABM's payroll department.

Brooks was a working leadman and performed janitorial duties when he deemed it necessary to do so. In May 1987, there were 17 employees working on the day crew under Brooks plus 1 employee on the swing shift who reported directly to Burrus for his assignments. Employees obtained assignments from Brooks and looked to him as their manager or supervisor. Brooks has issued some written warnings but has never issued or recommended any more serious discipline.

There were 19 employees on the night shift reporting to Elijah Price. Price had supervised the night crew at Respondent's headquarters in 1977–1978. When ABM was awarded the contract in 1982, it specifically requested that ABM transfer Price from one of its other locations and that request was granted. The night janitors performed traditional janitorial and custodial work under Price's supervision. None of Respondent's supervisors were present while this work was being done. A security officer was present when cleaning was performed in the security areas of the facility. Price was in contact with Burrus and Vern Vette, Burrus' supervisor, on a regular basis to discuss the work, complaints, and special assignments. On occasion, Burrus would request Brooks to correct or complete work from the night crew.

Price testified that he recommended discipline of employees and on one occasion discharged an employee for being intoxicated on the job. The employees got their work assignments from Price. However, after the initial assignment little or no additional supervision was necessary. Price followed the collective-bargaining agreement in scheduling vacations for employees on his shift.

Jack Ferguson, ABM's division manager, testified that the night shift was under the direction and supervision of Price. According to Ferguson, the night crew cleaning operation was typical as compared to the approximately 150 buildings ABM serviced in the Los Angeles area. However, the day crew performed services such as moving furniture and delivering coffee service which varied from day to day. Ferguson testified that he was concerned that ABM did not have sufficient supervision on the day crew. Ferguson inquired whether Respondent required more supervision on the day shift and was told by his manager that between Brooks and Respondent's personnel on the premises, Respondent was satisfied with the day-shift supervision.

The General Counsel contends that Respondent was involved in the hiring and firing of ABM's employees. The 1977 contract between Respondent and ABM provided that three named employees receive specified wages above union scale. There was no evidence concerning how this provision was negotiated. In any event, there was no similar provision in the more recent 1982 contract. In 1984, Respondent negotiated an amendment to its contract with ABM to direct that a portion of the day crew be assigned to the garage.[8] Early that year Respondent requested that the garage employees be exempted from the layoff requirements of the contract because of their different job duties and skills.

In 1985, employee Joe Cabezas was found sleeping on the job by an employee of Respondent. A report was made to Burrus who filed a written report with ABM. According to Ferguson, Burrus said that Cabezas would no longer be permitted on Respondent's premises.[9] Based on Burrus' com-

[5] Respondent was required by California law to include this requirement in its contracts. Sec. 465 California Public Utilities Code.

[6] Brooks used the terms leadman and foreman interchangeably.

[7] While the General Counsel and the Union argue that Brooks submitted employee time records for Burrus' approval, the evidence suggests that Brooks merely showed Burrus the charges so that there would be no disagreement over the bill.

[8] There were eight or nine employees assigned to work in Respondent's garage until the early part of 1987. The discontinuance of this service is not at issue here.

[9] Burrus denied telling Ferguson that Cabezas would not be permitted on the premises. However, I credit Ferguson's testimony, corroborated by his 1985

plaint, ABM terminated Cabezas. Ferguson could have transferred Cabezas to another facility but chose to discharge the employee. There was also vague testimony that in 1986 another employee was terminated based on a report from Burrus to ABM. There is nothing in the record to suggest that Burrus did anything other than report employee malfeasance.

The General Counsel similarly contends that Respondent directed changes in ABM's staffing levels. In 1983, 1984, and 1986 Respondent negotiated changes in the staffing levels of the day crew. However, there is nothing to suggest that these were other than negotiated changes in the requirements for the day shift. As mentioned earlier the day shift, as opposed to the night shift, required a certain number of employees rather than specified cleaning services. More specifically in 1986 Respondent sought to decrease its costs under the janitorial contract. ABM proposed that costs could be reduced by rolling back wages,[10] decreasing staff on the day shift and reducing the frequency of certain tasks on the night shift. After Respondent selected where it desired to cut costs, ABM notified the Union of the proposed changes affecting the bargaining unit and received union approval.

James Zellers, union president, testified that assent was given not to assist ABM but rather to accommodate Respondent. Zellers testified that the Union had to look past the contractor because ''contractors come and go.'' According to Zellers, it was the Union's objective to continue a good relationship with Respondent. However, Zellers admitted that there were no conversations between the Union and Respondent concerning these matters. The accommodations were worked out between the Union and ABM. The ''good relationship'' was assumed by the Union based on the fact that the employees continued working without interruption even when there was a change in janitorial service contractors.

The General Counsel argues that Respondent directed the work of employees. However, the evidence establishes only rare incidents of such direction. Anabelle Reed testified that she worked in the canteen directly for one of Respondent's supervisors between 1975–1985. Lillie Shaw testified in 1987 when she served coffee, Burrus and Vette checked the coffee carts. However, Vette and Burrus testified that they were concerned with pilferage by Respondent's employees and were not checking on the work of Shaw or other janitorial employees. Soledad Gonzalez testified that a security guard accompanied her when she worked in the security areas. Other incidents were isolated and could just as easily be categorized as requests by the customer as directions. The general practice was that assignments, orders, requests, and complaints were given to Brooks and Price, and that these supervisors took the necessary steps to accomplish the task. The nature of the day-shift assignments, moving furniture and catering services, required daily receipt of orders. Brooks would then have the responsibility of seeing that the orders were fulfilled correctly. As indicated earlier, Brooks would be present to oversee work or would later view the work to verify that it was performed satisfactorily.

In December 1986, Respondent notified ABM that the day-shift janitors would not be required to work on New Year's Eve.[11] ABM gave the employees the day off. Respondent's employees had the day off and there was no need for coffee service or furniture moving. However, the night-shift janitors were not given an additional day off. A grievance was filed over this incident and was resolved by ABM and the Union without participation by Respondent.

E. *The Termination of ABM's Contract*

On March 30, 1987, Respondent notified ABM that the cleaning contract would be rebid, and stated its intention to terminate the ABM contract effective May 31, 1987. ABM gave timely notice of the proposed termination to the Union. Respondent admits that in the spring of 1987, it changed its bid policy to include nonunion companies on the invitation list, in order to save costs and in an attempt to contract with minority-owned businesses.

The bid specifications required that the contractor pay at a minimum prevailing wages and certain health and welfare benefits as determined by the California Public Utilities Commission. In addition, the specifications issued in May 1987 provided that the successful bidder would be required to retain seven then-current employees, at their current wages of $7.73 per hour, a rate above the prevailing wage rate set by the PUC. The employees were to be identified after award of the contract.

Effective June 1, 1987, Respondent awarded the contract to Southern Counties Building Maintenance Co. Southern Counties was the first nonunion contractor to be awarded the contract and the first contractor not to retain the janitors then working at the facility. Southern Counties hired Brooks and six other employees requested by Respondent pursuant to the bid requirements. Southern Counties also hired two day-shift employees that were recommended by Brooks. The night-shift employees and five day-shift employees were replaced by Southern Counties.

The contract between Respondent and Southern Counties was terminated in August 1987. On August 20, 1987, Respondent sent out bid invitations to both union and nonunion contractors. On September 14, 1987, Respondent awarded a contract to Advanced Building Maintenance Co., another nonunion contractor which became the contractor for the night crew and five day crew employees. On the same date, Respondent entered into an agreement with United Temporary Services, also nonunion, to employ the nine day-shift employees who had previously worked for ABM and Southern Counties. Respondent admits that it was a joint employer of the nine employees employed through United Temporary. Respondent's chairman of the board had directed that the ''old timers'' be taken care of. These nine employees were later placed directly on the payroll of Respondent and were treated as janitors under the Respondent's collective-bargaining agreement covering production and maintenance employees retroactive to September 14, 1987.

As stated above, Advanced provided night-shift janitorial services as well as five day-shift employees. The five day-shift employees were supervised by Brooks (then employed by United Temporary and Respondent). Thus Brooks super-

memorandum, that Burrus expressed the position that Cabezas would not be allowed back at the facility.

[10] ABM's memorandum to Respondent indicated that a rollback in wage would have to be approved by the Union and would only be approved when ''there was a present threat of the building going non-union.''

[11] New Year's Eve was not a holiday under the ABM-Union bargaining agreement.

vised all day-shift janitors whether employed by Advanced, United Temporary, or Respondent.

Although notified of the termination of the ABM—Respondent contract in early April, the Union did not request bargaining. Based on the past history, the Union assumed that the succeeding contractor would employ the same employees at the same wages and benefits. However, in June 1987, the Union learned that employees had been terminated when Southern Counties took over the janitorial and service contract. The Union picketed and demonstrated outside Respondent's facility on August 19, September 3, and October 2 and 14, 1987.

On September 2, 1987, the Union demanded recognition from Southern Counties and Respondent. Thereafter, on October 2, the Union sent a letter to Advanced and Respondent requesting recognition and bargaining for the janitorial employees. The demands for recognition were the first manifestation of the Union's position that Respondent was the joint employer of the janitorial employees.

On October 15, Marta Padilla, Norma Padilla, Ofelia Rico, Aurora Acevedo, and Teodoro Romo, all Advanced night-shift employees, were terminated in response to the Union's picketing and demonstration in front of Respondent's facility.[12] Advanced's night-shift leadman Eluterio ''Junior'' Acosta testified that he was told by Arturo Ojeda, Advanced's supervisor for the Gas Company account, that Respondent did not like the demonstration and that Respondent's supervisors had told Ojeda to fire all the employees because of the demonstration. Acosta answered that he could not fire all the employees because he could not handle the work. Ojeda replied that Acosta should fire half the employees. Acosta said he needed some English speaking employees and Ojeda told Acosta to discharge Marta and Norma Padilla, Aurora Acevedo, Ofelia Rico, and Teodoro Romo.

Marta Padilla testified that when she asked Ojeda why she was fired, he answered because of the turmoil caused by the union demonstrations. Ojeda said Respondent did not want the employees at its facility and that each employee would be fired. Norma Padilla corroborated her sister's testimony. According to Norma Padilla, Ojeda said Respondent no longer wanted the employees at its facility because of the union demonstration.

Ojeda denied the testimony of Acosta and the Padilla sisters. Ojeda was a very insincere witness and his testimony is not credited. Ojeda admitted having conversations with the employees but could not recall the content of the conversations. According to Ojeda, he decided to terminate the employees because they were not doing their work well, were missing days of work, and were often late. He later said work performance was not a reason and gave absence from work as the reason. However, Advanced's records established that the employees did not have the number of absences attributed to them by Ojeda nor did the employees have the number of absences considered excessive by Advanced. Another employee discharged by Advanced for excessive absences had been given oral and written warnings prior to discharge. In sum, Ojeda gave shifting and indefinite reasons for the discharges. However, he could come up with no reason for the discharges which would withstand scrutiny.

Based on the timing of the discharges, the admissions made to Junior Acosta, and the reasons given to the Padilla sisters, I find that Advanced discharged the five employees because of their participation in or support of the Union's demonstration. I further find the reasons submitted by Ojeda to be false and insufficient to rebut the evidence of an unlawful motive for the discharges. On the record before me, there is no doubt that Advanced discharged the employees in violation of Section 8(a)(3) and (1) of the Act. The question presented is whether there is a sufficient basis in law and fact to hold Respondent jointly liable for Advanced's unlawful conduct.

The Union argues that the out-of-court statements of Ojeda, received in evidence as admissions of Advanced, should also be considered as admissions by Respondent or, in any event, admitted against Respondent despite their hearsay nature. I find no exception to the hearsay rules to permit using Ojeda's statements against Respondent. There is no evidence of agency under recognized principles of agency law or within the meaning of Rule 801(d)(2) of the Federal Rules of Evidence. The Union seeks to use the instant hearsay statements to establish the agency which would make those statements nonhearsay. Agency, whether actual, apparent, or implied, must be based on conduct of the principal, not the agent. Agency may not be proven merely by the words of the agent.

Even assuming arguendo that hearsay can be admitted in administrative hearings, the issue is still fundamental fairness and probativeness. I would not rely on hearsay unless the surrounding circumstances indicated reliability. Here, I have found Ojeda to be less than truthful while under oath. I am less likely to find his out of court statements to be truthful. Perhaps if his statements were against his interest, I might deem them to have some indicia of reliability. However, I find placing the onus of the discharges on Respondent, rather than Ojeda or his employer, a sufficient basis for Ojeda to be deceitful at that time. Under the circumstances, I do not find that the proffered statements, hearsay when offered against Respondent, carry any indicia of reliability and would not rely on them even if admissible.

F. *Subsequent Events*

In February 1988, Respondent ceased using the services of Advanced. The janitorial employees were merged into the existing production and maintenance bargaining unit. Nine day-shift janitors had previously been merged into that unit. All janitorial employees are now represented by the Utility Workers and Chemical Workers unions under a contract which covers production and maintenance employees. The charge covering the placement of the janitorial employees in this bargaining unit was withdrawn pursuant to an agreement between the Unions.

[12] As mentioned earlier, Advanced executed an informal settlement agreement remedying the allegations concerning the unlawful termination of the five night janitors. However, the settlement leaves to the instant case all questions concerning Respondent's conduct and responsibility with respect to the five discharges.

As will be seen above, the evidence establishes that Advanced discharged the five employees in violation of Sec. 8(a)(3) of the Act. The question presented here is whether Respondent can be held responsible for the acts and conduct of Advanced.

III. ANALYSIS AND CONCLUSIONS

A. *The Joint Employer Issue*

An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for. It follows that the existence of such control, is not in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees. Generally a joint employer finding is justified where it has been demonstrated that the employer-customer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. *Pacific Mutual Door Co*., 278 NLRB 854 (1986); *Boire v. Greyhound Corp*., 376 U.S. 473 (1964); *NLRB v. Browning-Ferris Industries of Pennsylvania*, 691 F.2d 1117 (3d Cir. 1982), enfg. 259 NLRB 148 (1981). The joint employer concept recognizes that two or more business entities are in fact separate but they share or codetermine those matters governing the essential terms and conditions of employment. *Laerco Transportation*, 269 NLRB 324, 325 (1984); *Clinton's Ditch Co*., 274 NLRB 728 (1985), enf. denied 778 F.2d 132 (2d Cir. 1985); *Sun-Maid Growers of California*, 239 NLRB 346 (1978), enfg. 618 F.2d 56 (9th Cir. 1980).

In determining whether a joint employer relationship exists, the issue to be resolved is whether the employer exercises, or has the right to exercise, sufficient control over the labor relations policies of the contractor or over the wages, hours, and working conditions of the contractor's employees from which it may be reasonably inferred that the employer is in fact an employer of the contractor's employees. *Cabot Corp*., 223 NLRB 1388 (1976); *Syufy Enterprises*, 220 NLRB 738 (1975). Primarily, the question of joint employer status must be decided on the totality of the facts of the particular case. For the following reasons, I find and conclude that Respondent was not the joint employer of the cleaning and janitorial employees of ABM.

In the instant case, Respondent has a long history of subcontracting out janitorial work. The contracts were rebid every 5 years and contained a provision that either party could terminate on 60 days' notice. The last contract between Respondent and ABM contained detailed specifications of the work to be done. However, the contract specifically stated that ABM was ''an independent contractor and that any provisions in this contract which may appear to give the Company the right to direct contractor as to the details of the doing of any work to be performed shall be deemed to mean that contractor shall follow the desires of the Company in the results of the work only and not in the means whereby said work is to be accomplished.'' Thus, Respondent and ABM set forth in their contract that Respondent would direct ABM as to where and when the contractor would perform its services.[13] Respondent would expect ABM to perform to its satisfaction. However, the means of accomplishing such results were left to ABM and its supervisors. ABM is a separate company which performs similar work for other building owners and managers.

There has also been a long history of collective bargaining between ABM and the Union. ABM's employees, including those working at Respondent's facilities, have been covered by a series of collective-bargaining agreements. These collective-bargaining agreements set forth the wages, hours, fringe benefits, and other working conditions of the ABM employees. The evidence establishes that these contracts were negotiated without any participation by Respondent.[14] There was no evidence that Respondent's lack of participation in bargaining effected the bargaining process. Grievances or disputes were resolved by ABM and the Union. When Respondent sought changes which impacted on jobs for the janitors, ABM sought and obtained union acquiescence. There was no bargaining between Respondent and the Union. Moreover, there was not even any communication between Respondent and the Union. The Union's belief that any subsequent contractor would employ these same employees under a union contract was based on its own conclusions based on past experience and not on any representation of Respondent. The Union did not raise any question of a joint employer relationship until October 1987, more than 4 months after ABM had lost the contract.

ABM's performance of the night-shift janitorial work was consistent with the work performed for its other customers. ABM's supervisor assigned and directed the employees work. At the outset of the contract, Respondent requested Elijah Price be assigned as supervisor and ABM transferred Price from supervision at another building. Price testified that Respondent, like other utility companies, was a demanding customer. There were no supervisors of Respondent present while the night shift performed their work. The evidence indicates that Respondent often left messages or communicated with Price. However, this evidence simply established that Respondent's supervisors were attempting to obtain satisfactory performance of the assignments covered by the contract. In certain areas of the building, Respondent's security personnel were present for security reasons. This evidence did not amount to supervision or direction of employees.

The day-shift operation was significantly different from ABM's normal janitorial and cleaning service provided for other customers. In addition to cleaning services, Respondent contracted for a number of employees to perform services such as moving furniture and providing coffee services. Here Respondent contracted for a specific number of employees. The assignments of these employees were dependent on the daily needs of the office and professional staff. To meet these needs, orders were given to Respondent's supervisors and routed to Walter Brooks. Brooks would assign employees to the tasks and supervise their work. If Brooks could not be present, he would later check to confirm that the work was performed properly. Brooks made every effort to insure that the work was performed to Respondent's satisfaction. I do not find such conduct proves supervision by Respondent over Brooks. Rather, I find that Brooks perceived his function as insuring that the work was done to the customer's satisfaction. The employees perceived Brooks as their manager. The nature of these porter services required more direction than the night-time cleaning services. Respondent's requirement of setting up meeting rooms or conferences changed daily. Orders and requests came through constantly.

[13] See *Cabot Corp*., supra.

[14] See *Laerco Transportation*, supra.

Thus communication between Respondent's supervisors and Brooks was ongoing. Respondent's supervisors would be present and checking to insure compliance with the requests and needs of the office staff but they dealt directly with Brooks. I find that Respondent's orders and directions to the day-shift employees were in the nature of routine directions of what tasks were required and where they were to be performed. I find such direction consistent with Respondent's object of obtaining results, i.e., the work it contracted for. I do not find such assignment or direction establishes evidence of supervision of ABM's employees. ABM provided the crew and Walter Brooks to perform these porter services for Respondent. Most important, the significant functions of hiring and firing, the processing of grievances, negotiating contracts, the granting of vacations or leaves of absences, were retained by ABM.

The General Counsel argues that Brooks was not a supervisor but merely a liaison between Burrus and the janitorial employees. I reject that argument. The evidence establishes that Respondent dealt directly with Brooks pursuant to its contract and that Brooks provided the necessary supervision. Brooks made the necessary assignments. He ensured that the work was carried out and that it was performed satisfactorily. ABM's Ferguson inquired whether more supervision was necessary and was informed that Respondent was satisfied with the job Brooks was doing. I do not draw the inference that Brooks was not a supervisor or that Burrus was supervising the employees. Rather, I draw the inference that Brooks and the employees under him were performing the tasks in a satisfactory manner. Thus, supervision in excess of that provided by Brooks was not necessary.

The General Counsel argues that Respondent discharged employee Joe Cabeza. I do not draw the same inferences from the facts. Rather, I find that Respondent complained directly to ABM that Cabeza was sleeping on the job. At most, Respondent indicated that it no longer wanted Cabeza working at its facility. It was ABM that chose to discharge Cabeza rather than to transfer him to another job location. If Cabeza's transgression was challenged under the collective-bargaining agreement, it was ABM, not Respondent, that would have to resolve the matter. I draw the inference that Respondent did not suffer quietly Cabeza's misconduct because it consistently sought satisfactory performance of the contract. Respondent brought its complaints directly to ABM's management. I do not find that Respondent discharged Cabeza or any other ABM employee. The actions of Respondent seem merely to be the exercise of the right of an owner or occupant to protect his premises. See *Hychem Constructors*, 169 NLRB 274, 276 (1968).

The evidence establishes that while Respondent assigned and directed porter and janitorial work, the significant indicia of employer status and control over labor relations were retained by ABM. ABM handled its own payroll. The employees were paid by ABM on the basis of records prepared and forwarded by Price and Brooks. The employees received the fringe benefits provided for in the collective-bargaining agreement between ABM and the Union. Respondent's employees were compensated under different contracts with different unions. The significant terms and conditions of employment of the janitors were effectively controlled by the ABM-Union contract.

Based on the foregoing, I find and conclude that Respondent was not a joint employer with ABM of the janitorial employees. As the 8(a)(5) allegations were predicated on Respondent being a joint employer with ABM, my finding to the contrary prescribes dismissal of those allegations.

B. *Respondent's Liability for Advanced's Unlawful Conduct*

Although I have found Respondent was not the joint employer of ABM's employees, it does not necessarily follow that the same conclusion is reached concerning Advanced. Advanced was not a large independent company like ABM. Advanced's employees were not governed by a collective-bargaining agreement. The Advanced employees working at Respondent's facility received better wages and benefits than the other Advanced employees. Based on the contract with Respondent, Advanced was required to pay the employees the prevailing wage. Further, Advanced took over the night crew but only five employees on the day crew. Respondent hired Brooks and eight employees through United Temporary. The five Advanced day-shift employees were supervised by Brooks but paid less than the United employees. Again the night crew operated in the normal fashion under the direction of Advanced's supervisor without the presence of Respondent's supervisors. The day crew received assignments from Respondent and supervision from Brooks (then an employee of United and Respondent). The only difference between the Advanced day-shift employees and the United-Respondent day janitorial employees appears to be payment.

Assuming Respondent was the joint employer of Advanced's day-shift employees, I do not find that Respondent was jointly liable for the unlawful terminations of the night janitors at issue here. As indicated earlier, the joint employer concept recognizes that two business entities are in fact separate but they share or codetermine those matters governing the essential terms and conditions of employment of certain employees. Liability of joint employers for the commission of unfair labor practices by one of them is confined to the scope of the joint employer relationship. *Food & Commercial Workers (R & F Grocers)*, 267 NLRB 891, 893 fn. 7 (1983). The five employees unlawfully terminated on October 15, 1987, were all night-shift employees. They were supervised by Advanced's leadman Acosta and supervisor Ojeda. Ojeda reported to Advanced's vice president Jaramillo. There was no evidence of control by Respondent over this night shift. Rather, it appears that Advanced was acting independently of Respondent. The only evidence relied on by the General Counsel and the Union is the discredited hearsay of Ojeda that Respondent ordered the discharges. The General Counsel has produced no credible evidence that Respondent was acting jointly with Advanced in the operation of the night shift or in the act of discharging these employees.

Although the General Counsel and the Union argue that Advanced was acting at the behest of Respondent, there is no credible evidence to support that allegation. The timing of the discharges, Ojeda's admissions and the absence of a legitimate reason for the discharges support a finding that Advanced discharged the employees because of their participation in a union demonstration. It does not follow that Advanced did so at Respondent's direction or urging. Advanced, a nonunion company, could very well have an

antiunion motive of its own. The Union had just demanded recognition and bargaining from Advanced. I find significant union animus to be demonstrated by the discharges themselves. The evidence establishes that Burrus and other supervisors were displeased by the union demonstrations. However, that evidence is not sufficient to establish that Respondent took steps to retaliate against the Advanced employees. Accordingly, I find that Respondent has not violated the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to establish by a preponderance of the evidence that Respondent violated Section 8(a)(5) and (1) of the Act, as alleged in the complaint.

4. The General Counsel has failed to establish by a preponderance of the evidence that Respondent violated Section 8(a)(3) and (1) of the Act, as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The complaint is dismissed in its entirety.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.